Nos. 14-1513, 14-1520

IN THE

Supreme Court of the United States

HALO ELECTRONICS, INC.,

Petitioner,

v.

PULSE ELECTRONICS, INC. *et al.*,

Respondents,

and

STRYKER CORPORATION, *et al.*,

Petitioners,

v.

ZIMMER, INC. *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* INTERNET COMPANIES IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. Punitive Damages Under Section 284 Should Be Used Only to Deter Willful Misconduct. 4

II. Patentees Abuse the Current Willfulness Doctrine 7

III. A Lax Treble Damages Doctrine Creates Unnecessary Drag on Innovating Companies 13

A. Overly Strict Willfulness Law Encourages Companies to Avoid Learning About Patented Innovations 13

B. Overly Strict Willfulness Law Hinders Collaboration 15

Table of Contents

Page

IV. This Court Should Make the Standard for Awarding Treble Damages More Stringent, Not Less 17

CONCLUSION 19

TABLE OF CITED AUTHORITIES

Page

Cases

Aro Mfg. Co. v. Convertible Top Replacement Co.,
377 U.S. 476, 84 S. Ct. 1526 (1964) 4

Avia Group Int'l, Inc. v. L.A. Gear, Cal., Inc.,
853 F.2d 1557, 7 U.S.P.Q.2d (BNA) 1548
(Fed. Cir. 1988) 4

Brookville Equip. Corp. v. A.L. Lee Corp.,
No. 13CV0059, 2013 WL 1195116
(W.D. Pa. Mar. 22, 2013) 9

Commil USA, LLC v. Cisco Sys., Inc.,
135 S. Ct. 1920, 191 L. Ed. 2d 883 (2015) 4

Creagmile v. John Bean Mfg. Co.,
32 F. Supp. 646, 45 U.S.P.Q. (BNA) 26
(S.D. Cal. 1940) 5

Creative Internet Adver. Corp. v. Yahoo! Inc.,
No. 6:07cv354, 2009 WL 2382132
(E.D. Tex. July 30, 2009) 8

Day v. Woodworth,
54 U.S. (13 How.) 363, 14 L. Ed. 181 (1851) 4

Egyptian Goddess, Inc. v. Swisa, Inc.,
543 F.3d 665, 88 U.S.P.Q.2d (BNA) 1658
(Fed. Cir. 2008) 4

Cited Authorities

Page

Festo Corp. v.
Shoketsu Kinzoku Kogyo Kabushiki Co.,
535 U.S. 722, 122 S. Ct. 1831 (2002).....15

Finjan Software, Ltd. v.
Secure Computing Corp.,
C.A. No. 06-369, 2009 WL 2524495
(D. Del. Aug. 18, 2009).....8

Global-Tech Appliances, Inc. v. SEB S.A.,
131 S. Ct. 2060, 179 L. Ed. 2d 1167 (2011).....18

In re Seagate Tech., LLC,
497 F.3d 1360, 83 U.S.P.Q.2d (BNA) 1865
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Kinetic Concepts, Inc.,
599 F.3d 1377, 94 U.S.P.Q.2d (BNA) 1307
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549 U.S. 118, 127 S. Ct. 764 (2007).....10

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(Fed. Cir. 2011).....10

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Page

Reed Roller Bit Co. v. Hughes Tool Co.,
12 F.2d 207 (5th Cir. 1926) 5

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133 F.3d 1469, 45 U.S.P.Q.2d (BNA) 1468
(Fed. Cir. 1998) 10

Seymour v. McCormick,
57 U.S. (16 How.) 480, 14 L. Ed. 1024 (1853).....5

Slimfold Mfg. Co. v. Kinkead Indus., Inc.,
932 F.2d 1453 (Fed. Cir. 1991).....16

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751 F.2d 1226 (Fed. Cir. 1985) 16

Underwater Devices Inc. v.
Morrison-Knudsen Co.,
717 F.2d 1380, 219 U.S.P.Q. (BNA) 569
(Fed. Cir. 1983).....7

Walker Process Equip., Inc. v.
Food Mach. & Chem. Corp.,
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Statutes

35 U.S.C. § 100.....6

35 U.S.C. § 271.....12

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Page

35 U.S.C. § 284 ..... 1, 4, 6

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35 U.S.C. § 311 11

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Page

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Mark A. Lemley & Ragesh K. Tangri, *Ending Patent Law's Willfulness Game*, 18 BERKELEY TECH. L.J. 1085 (2003) 11, 13

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Paul Shukovsky, *Bill Dubbed 'Patent Troll Prevention Act' Put in Front of Washington State Lawmakers*, BNA (Jan. 28, 2015) 12

Ronald G. Blum & Andrew J. Turro, *The Self-Evaluative Privilege in the Second Circuit: Dead or Alive?*, N.Y. ST. B.J., June 2003.....9

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Page

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Rules

Supreme Court Rule 37.6.....1

INTEREST OF *AMICI CURIAE*[1]

Check Point Software Technologies, Inc., LinkedIn Corporation, Mozilla Corporation, Netflix, Inc., Pinterest, Inc., Roku, Inc. and Twitter, Inc. (Amici) are technology and Internet companies. Amici are inventors and patent owners, but they also face suits and threats of suit by patent owners. Amici have no direct stake in the outcome of this case, but have a strong interest in seeing that patent law encourages rather than threatens innovation.

SUMMARY OF THE ARGUMENT

In the 1952 Patent Act, Congress expressly allowed courts to increase damages in certain patent cases. *See* 35 U.S.C. § 284 ("[T]he court may increase the damages up to three times the amount found or assessed."). Courts have appropriately limited the risk of treble damages to instances of willful infringement, offering some protection to innovators, and this Court should not disturb that centuries-old rule.

This Court should, however, revisit the definition of willfulness. The Federal Circuit has set the standard for establishing willfulness so low that it creates an imbalance in the law. On one hand, even trivial knowledge of a patent may be enough to find a company guilty of willful infringement despite the fact that it independently

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1. Counsel for the parties have consented to the filing of this amicus brief. Pursuant to Rule 37.6, no counsel for either party had any role in authoring this brief in whole or in part, and no party other than the named Amici has made any monetary contribution toward the preparation and submission of this brief.

invented the technology in good faith, with no knowledge of the patent or the patentee. By contrast, the Federal Circuit requires a higher standard to show a real and immediate legal controversy sufficient for a declaratory judgment action to resolve the alleged infringer's risk. There is, therefore, an imbalance between the low level of knowledge sufficient to put a company at risk of incurring treble damages for willful infringement and the comparatively higher level of threat necessary for a company holding an honest belief that it will win in litigation to institute a declaratory judgment action and resolve that risk.

Some patent owners abuse this imbalance. For instance, some potential plaintiffs send tens of thousands of letters informing potential defendants of the existence of a patent without expressly threatening legal action. The patent owners' actions are not enough to subject themselves to declaratory judgment, but are sufficient to threaten defendants with the prospect of treble damages. With minimal effort, patent owners impose extraordinary litigation risks, and its attendant costs, without incurring any meaningful cost or risk to themselves. This uneven landscape makes innovation an uphill legal battle for companies seeking to advance technology while respecting patents.

The result is a perverse set of incentives. A company must either choose to carry the risk of treble damages without the possibility of definitive resolution or else actively shun *any* knowledge of existing patents. Faced with these risks, many companies today choose to counsel their scientists, engineers, and developers *not* to read patents. That may be the rational option for resolving the

risk, but it undercuts a fundamental justification of patent law: that the law bestows exclusive rights to an invention in exchange for disclosing the invention to the public. The imbalance between the treble damages standard and the declaratory judgment standard effectively *discourages* what the Patent Act was intended to *promote*: public exchange and awareness of advances in technology, to "promote the Progress of Science and useful Arts." U.S. Const. art. I, § 8, cl. 8

These perverse incentives also hamper efficient business collaboration. Companies that make the rational choice to advise their employees not to read patents will find it difficult to exchange technology, pool patents, or value patented contributions made by others. And even companies who are willing to risk reading patents will find collaboration difficult if their partners won't do so. As companies that participate in standards organizations, patent pools, and other consortia, we have experienced these problems first-hand.

This Court should limit treble damages to willfulness as that term is traditionally understood in other areas of law—a deliberate decision to violate a patent right or act with willful blindness to that right in producing a new product.

ARGUMENT

I. Punitive Damages Under Section 284 Should Be Used Only to Deter Willful Misconduct.

Patent infringement is a strict-liability offense. *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1926, 191 L. Ed. 2d 883 (2015) ("Direct infringement is a strict-liability offense."). Accordingly, the Patent Act does not impose punitive damages for all patent infringement. Rather, under normal circumstances, the Patent Act is designed to *compensate* for any damages infringement causes. *See* 35 U.S.C. § 284 ("[T]he court shall award the claimant damages adequate to compensate for the infringement, ...").

Treble damages under section 284 are a form of punitive damages. *See Avia Group Int'l, Inc. v. L.A. Gear, Cal., Inc.*, 853 F.2d 1557, 1566(Fed. Cir. 1988), *abrogated on other grounds by Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665 (Fed. Cir. 2008). Punitive and treble damages serve a narrower and more specific purpose: to deter undesirable conduct. However, *unintentional* conduct cannot readily be deterred, and certainly not without significantly chilling innovation.

That is why courts—including this Court—have long limited punitive damages to willful or bad-faith conduct. *See, e.g., Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 508, 84 S. Ct. 1526 (1964) ("[A patentee] could in a case of willful or bad-faith infringement recover punitive or 'increased' damages under the statute's trebling provision; . . . ."); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 372, 14 L. Ed. 181 (1851) (patent law allows

increasing damages only "if, in the opinion of the court, the defendant has not acted in good faith, or has been stubbornly litigious, ..."). *Cf. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 179, 86 S. Ct. 347 (1965) (Harlan, J., concurring) (finding knowing or willful conduct by patentees a requirement for treble damages under the Sherman and Clayton Acts).

Even before Congress passed the current Patent Act of 1952, various regional circuits had limited punitive patent damages to instances of willfulness. *See, e.g., Creagmile v. John Bean Mfg. Co.*, 32 F. Supp. 646, 648-49 (S.D. Cal. 1940), *rev'd on other grounds*, 123 F.2d 182 (9th Cir. 1941); *Reed Roller Bit Co. v. Hughes Tool Co.*, 12 F.2d 207, 210 (5th Cir. 1926) (upholding enhanced damages based on willful infringement). For decades—if not centuries—Courts have generally applied treble damages for patent infringement only to instances of deliberate, willful misconduct. *See, e.g., Seymour v. McCormick*, 57 U.S. (16 How.) 480, 488-89, 14 L. Ed. 1024 (1853) (describing the "wanton and malicious pirate" as the target of willfulness law and punitive damages under patent law). Indeed, scholars have reviewed the historic evidence in detail and concluded that, before the creation of the Federal Circuit, willful infringement meant deliberate copying, not continued use of an independently created invention. *See* Matthew D. Powers & Steven C. Carlson, *The Evolution and Impact of the Doctrine of Willful Patent Infringement*, 51 SYRACUSE L. REV. 53, 55-79 (2001). When courts have a long-standing interpretation of a statute and Congress reenacts that statute, as it did with the Patent Act of 1952, it is presumed to have acquiesced in that interpretation. *See Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245, 180 L. Ed. 2d 131

(2011). At this late date, this Court should not abandon or dilute the role of true willfulness in determining punitive damages.

Moreover, Congress recently passed the America Invents Act, which amended the Patent Act to read:

> The failure of an infringer to obtain the advice of counsel with respect to any allegedly infringed patent, or the failure of the infringer to present such advice to the court or jury, may not be used to prove that the accused infringer willfully infringed the patent or that the infringer intended to induce infringement of the patent.

35 U.S.C. § 298. Since section 298 is the Patent Act's only reference to willful infringement, the fact that Congress created a new limitation on how a patentee can prove willful infringement would make no sense if section 284 were not understood to be about willful infringement. *See generally* 35 U.S.C. §§ 100. A limitation on a method of *proving* willful infringement is only rational if willful infringement is relevant to an element of patent litigation. Because the case law holds willfulness to be a prerequisite for treble damages, section 298 must be further evidence of Congressional acquiescence to the long line of cases limiting treble damages to willfulness.

This Court should confirm that willfulness remains a prerequisite for treble damages and should consider whether the current willfulness standard faithfully serves the purpose of deterring intentional undesirable conduct, or whether it tends to do more harm than good.

II. Patentees Abuse the Current Willfulness Doctrine

Punitive damages are designed to punish, and therefore deter, bad conduct—the willful violation of patent rights. The current willfulness standard allows patent holders to manufacture willfulness where none exists and provides incentives for them to assert willfulness in all cases, regardless of the underlying facts.

Federal Circuit law does not limit treble damages to those who have actually copied a patentee's invention or acted intentionally; it can impose punitive damages on a company that develops an invention *independently* if the patent holder simply notifies that company of the patent. *See In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (*en banc*). This is true even if that notice comes long after the allegedly infringing product was designed, developed, tested, marketed, and released. *Id.*

In 1983, the Federal Circuit went as far as to create an affirmative *duty* to obtain an opinion-of-counsel letter when informed of the existence of a patent. *See Underwater Devices Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1389-90 (Fed. Cir. 1983). Recently, the Federal Circuit overruled *Underwater Devices*, raising the standard for willfulness to "objective recklessness," *In re Seagate Tech., LLC*, 497 F.3d 1360, 1370-72 (Fed. Cir. 2007). Correspondingly, Congress declared that *lack* of an opinion letter cannot be used as affirmative evidence of willfulness. *See* 35 U.S.C. § 298. Nevertheless, the Federal Circuit still does not require that the defendant copied the invention from the plaintiff, or even that the defendant act intentionally. *See In re Seagate Tech., LLC*, 497 F.3d at 1371. If an independent developer

learns of a patent after selling its product for years and does not immediately conduct a thorough litigation-risk investigation, it may be found willful for not immediately halting sales of its product if it ultimately turns out that a post-release investigation would have shown a significant risk of infringement. *Id.* Moreover, despite the nominally stricter standard, the Federal Circuit and lower courts continue to stress the importance of opinions of counsel as part of the "objective assessment" made by businesses. *Id.* at 1371, 1373; *see also Finjan Software, Ltd. v. Secure Computing Corp.*, C.A. No. 06-369, 2009 WL 2524495, at *15 (D. Del. Aug. 18, 2009), *rev'd on other grounds*, 626 F.3d 1197 (Fed. Cir. 2010) ("While there is no longer an affirmative duty of care that requires an accused infringer to obtain an opinion of counsel, the fact that Secure did not seek any such opinion may be considered in the totality of circumstances surrounding willful infringement."); *Creative Internet Adver. Corp. v. Yahoo! Inc.*, No. 6:07cv354, 2009 WL 2382132, at *5 (E.D. Tex. July 30, 2009).

Thus, even under the *Seagate* standard for willfulness, a patent owner can manufacture an allegation of willfulness simply by contacting the potential defendant. That is why an overwhelming majority of complaints (80-90%) allege willfulness, even though only a handful of defendants (barely 10%) are alleged to have copied from patent owners. *See* Christopher A. Cotropia & Mark A. Lemley, *Copying in Patent Law*, 87 N.C. L. REV. 1421, 1442-43 (2009); Kimberly A. Moore, *Empirical Statistics on Willful Patent Infringement*, 14 FED. CIR. B.J. 227, 232 (2004). The "willful" misconduct that gives rise to treble damages, on this theory, is not any intentional act but the failure to immediately stop selling a product when first

contacted by a patentee. All patent holders must do is send a letter with the patent number, and that exposes a company to allegations of willful infringement even if it subjectively believes the patent is invalid or not infringed. *See In re Seagate Tech., LLC*, 497 F.3d at 1371 ("The state of mind of the accused infringer is not relevant to this objective inquiry.").

The effect of a threat of treble damages is not limited to the courtroom. This same letter that threatens punitive damages also triggers a variety of ancillary litigation costs. Patent owners can—and often do—use the threat of treble damages as settlement leverage, even in nuisance-value cases. Even if a company sees a particular case as a mere nuisance, the threat of treble damages is so severe—and the standard so low—it can have a significant impact on settlement negotiations. This is especially true because the manufactured allegations that support a willfulness allegation also make it difficult for a district court to dismiss a case on the pleadings. *See Brookville Equip. Corp. v. A.L. Lee Corp.*, No. 13CV0059, 2013 WL 1195116, at *3 (W.D. Pa. Mar. 22, 2013) ("Willfulness is a fact-intensive issue that is difficult to resolve at the pleading stage." (citation and alteration omitted) (collecting cases)). Moreover, this letter may trigger an internal investigation within the company. Such internal investigations can, alone, be costly, but the cost can often be compounded because the uncertain nature of privilege surrounding internal investigations can lead to costly discovery battles. *See, e.g.*, Gideon Mark & Thomas C. Pearson, *Corporate Cooperation during Investigations and Audits*, 13 STAN. J.L. BUS. & FIN. 1, 25-26 (2007); Ronald G. Blum & Andrew J. Turro, *The Self-Evaluative Privilege in the Second Circuit: Dead or Alive?*, N.Y. ST. B.J., June 2003, at 44, 47.

This letter-notice system of willfulness puts all the risk squarely on the receiving company. The recipient of such a letter is immediately at risk of treble damages but is unable to use the tool Congress established to resolve that kind of risk: a declaratory judgment action.[2] The purpose of the declaratory judgment statute is to prevent precisely this kind of litigation risk, but it fails in these circumstances because of the disparity between the willfulness standard and the declaratory judgment standard. *See Scholle Corp. v. Blackhawk Molding Co.*, 133 F.3d 1469, 1472 n.1 (Fed. Cir. 1998) (holding that a letter asserting a patent, but refusing to take an express stance on infringement is sufficient for willfulness, but not sufficient for declaratory judgment) (collecting cases)).

While this Court in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 S. Ct. 764 (2007), sought to make it easier to file a declaratory judgment action by eliminating the "threat of imminent suit" test, subsequent Federal Circuit decisions have in effect reimposed that test, making it impossible for a company that has been put on notice of a patent to sue to clarify its rights. *See, e.g., Innovative Therapies, Inc. v. Kinetic Concepts, Inc.*, 599 F.3d 1377 (Fed. Cir. 2010).[3]

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2. The Federal Circuit's personal jurisdiction law further slants the litigation landscape against potential defendants. Under Federal Circuit law, a patentee does not subject itself to personal jurisdiction for a declaratory judgment action in a state by sending a cease-and-desist letter to that state, *see Radio Sys. Corp. v. Accession, Inc.*, 638 F.3d 785, 789(Fed. Cir. 2011), making it difficult for out-of-state potential defendants to resolve their risk.

3. Although *inter partes* review proceedings create a means for resolving certain narrow questions of invalidity on prior art grounds, an *inter partes* review cannot address issues of noninfringement,

Without access to declaratory judgment to resolve the risk of potential treble damages, companies must either cease all allegedly infringing activity, even for products years in development or even where the alleged infringement is incidental to the overall product, or take the expensive and time-consuming precaution of arming themselves with the ammunition it takes take to fight the willfulness battle. The common response of hiring lawyers to write opinions of counsel is especially costly. A company must hire different lawyers for the opinion letter and the litigation in order to preserve privilege, *see In re Seagate Tech., LLC*, 497 F.3d at 1374-75, and because the letters themselves (written without the benefit of infringement or claim construction contentions, and usually requiring counsel to speculate as to what may be accused) are often directed to different defenses than those that actually get litigated at trial. These letters are not written to be traditional legal advice, but instead simply serve as a costly way of protecting oneself from the willfulness game. *See* Mark A. Lemley & Ragesh K. Tangri, *Ending Patent Law's Willfulness Game*, 18 BERKELEY TECH. L.J. 1085, 1092-93 (2003).

Two issues make this kind of conduct by patent owners especially problematic.

First, because a demand letter takes only minutes to draft at negligible cost, while each company that receives the letter must spend significant sums in investigation costs, some patent owners have a practice of sending tens of thousands of demand letters on a single patent. *See*

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indefiniteness, patentable subject matter, or other grounds for invalidity. *See* 35 U.S.C. § 311(b).

Paul Shukovsky, *Bill Dubbed 'Patent Troll Prevention Act' Put in Front of Washington State Lawmakers*, BNA (Jan. 28, 2015), http://www.bna.com/bill-dubbed-patent-n17179922552/ ("[S]mall organizations [may] buy up a patent or two then go send out demand letters to tens of thousands of people asking for a license or settlement that may in fact not be warranted."); Joe Mullin, *Reform groups: Bill to stop patent demand letters falls short*, Ars Technica, (Apr. 22, 2015 11:30 AM), http://arstechnica.com/tech-policy/2015/04/reform-groups-bill-to-stop-patent-demand-letters-falls-short/.

Second, many of these demand letters are not aimed at the developers or manufacturers of the products, but at end consumers. Patent law imposes liability on *users* of patented technology, not just the developers and manufacturers. *See* 35 U.S.C. § 271 ("[W]hoever without authority . . . uses . . . any patented invention, within the United States . . . infringes the patent."). These end users face the same abuses from patent holders, but have no ability to evaluate the claims asserted against them. For instance, an end consumer might purchase a computer chip with no understanding of exactly how the chip operates and no ability to determine how a third-party's confidential and proprietary technology works. Still, if a patentee sends that consumer a letter identifying a patent they allege covers the way the chip operates, that end consumer may be on the hook for treble damages with no means of determining whether or not they infringe.

Because it is easy, cheap, and risk-free for a patent owner to assert willfulness, and because of the tremendous cost and risk a willfulness allegation imposes on potential defendants, the current willfulness and declaratory

judgment law incentivizes patent owners to artificially manufacture allegations of willfulness.

III. A Lax Treble Damages Doctrine Creates Unnecessary Drag on Innovating Companies

Patent law is designed to "promote the Progress of Science and useful Arts." U.S. Const. art. I, § 8, cl. 8. However, the Federal Circuit's current strict interpretation of willfulness actually slows progress both by discouraging research into existing technologies and by making collaboration more difficult.

A. Overly Strict Willfulness Law Encourages Companies to Avoid Learning About Patented Innovations

Because mere awareness of a patent may be enough to subject a company to treble damages for willfulness (as discussed above), in-house counsel has a powerful incentive to advise their employees not to read patents, so as not to get drawn into the willfulness game. *See* Mark A. Lemley & Ragesh K. Tangri, *Ending Patent Law's Willfulness Game*, 18 BERKELEY TECH. L.J. 1085, 1100-102 (2003). Even in the absence of litigation, it can cost tens of thousands of dollars each time any individual engineer or scientist learns about any individual patent. Each time, the company must hire counsel to write an opinion letter for fear that eventual litigation might result in treble damages. That is a rational business decision given the level of risk; tens of thousands of dollars for an opinion letter is a form of insurance against tens—or even hundreds—of millions of dollars in liability for punitive damages.

Yet companies cannot afford to research all patented inventions and obtain an opinion letter for each. There are more than two million patents in force, with 300,000 new ones added every year. In many industries even a single product might be open to patent claims from hundreds of thousands of questionable patents. *See* David Drummond, *When patents attack Android*, Google Blog, (Aug. 3, 2011), https://googleblog.blogspot.com/2011/08/when-patents-attack-android.html ("A smartphone might involve as many as 250,000 (largely questionable) patent claims, and our competitors want to impose a 'tax' for these dubious patents that makes Android devices more expensive for consumers."). Allowing employees to research patents in industries like this might cost the company tens or hundreds of millions of dollars in opinion-of-counsel letters alone. Therefore, the rational decision is frequently to counsel developers and scientists not to read patents at all.

This is not a merely hypothetical concern. In-house intellectual property counsel, including those of *Amici*, regularly give this advice today. *See* Samuel Chase Means, *The Trouble with Treble Damages: Ditching Patent Law's Willful Infringement Doctrine and Enhanced Damages*, 2013 U. ILL. L. REV. 1999, 2012-14 (2013); Dennis Fernandez, *Move Over Letterman: Top 10 Most Common IP Management Mistakes for New Companies*, Pat. Strategy & Mgmt., July 1, 2003, at 3; Edwin H. Taylor & Glenn E. Von Tersch, *A Proposal to Shore Up the Foundations of Patent Law that the Underwater Line Eroded*, 20 HASTINGS COMM. & ENT. L.J. 721, 737, 747 (1998). In other words, sophisticated innovating companies today deliberately avoid contact with existing patents as a direct result of the Federal Circuit's willfulness doctrine.

This defeats one of the fundamental justifications of patent law: that the law bestows exclusive rights to an invention in exchange for disclosing the invention to the public. *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 736, 122 S. Ct. 1831 (2002). Today, many patentees obey this tenet in theory, but undermine it in practice. A patentee can publicly disclose an invention through the Patent Office, but threaten to seek treble damages from any company foolish enough to look through their patent portfolio. Whatever innovation patent law was designed to foster by making technological breakthroughs public, current willfulness doctrine undercuts by making it dangerous for innovating companies to consider that public record.

B. Overly Strict Willfulness Law Hinders Collaboration

Some of the most influential innovations come from collaboration between companies. For instance, nearly all standards-setting organizations—including the Moving Picture Experts Group (which created the MPEG standard for video and audio compression) and the Internet Engineering Task Force (which sets the open-source standards for the Internet Protocol)—are collaborative efforts. Current willfulness law not only hinders innovation within a company, it also hinders industry-wide collaboration.

Companies that actively advise employees not to read patents—as discussed in the previous section—maintain that advice in the context of a collaborative effort. But an unwillingness to read patents makes certain technical collaborations more difficult. Companies considering

adopting a new technical standard in a standard-setting organization, or companies considering entering into a joint venture, would like to know whether their collaboration partners hold patents on the technology being considered or even know of relevant patents in the space that may present a risk to the venture. But learning that fact puts them at risk of treble damages. As a result, collaboration partners may delay or even forego collaboration. We have first-hand experience with the difficulties this causes.

Further, collaborating companies must adhere to the "lowest common denominator" risk profile. Thus, even a company willing to read another's patented inventions is effectively prevented from collaborating with many other companies or innovating together with any reference to patents. Some parties require their consortia participants to literally *leave the room* when patent issues arise, so as to avoid any knowledge of the patents altogether. That slows and may even prevent important work on technical standardization—not because companies are seeking to avoid technical development, but precisely because they are doing their best to respect and learn from patents without exposure to treble damages.

Finally, companies might seek to collaborate in order to design around existing patents in order to develop better solutions to existing problems. This is a socially desirable activity. *Slimfold Mfg. Co. v. Kinkead Indus., Inc.*, 932 F.2d 1453, 1457 (Fed. Cir. 1991) (Rich, J.) ("Designing around patents is, in fact, one of the ways in which the patent system works to the advantage of the public in promoting progress in the useful arts, its constitutional purpose."); *State Indus. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985) ("One of the benefits

of a patent system is its so-called 'negative incentive' to 'design around' a competitor's products, even when they are patented, thus bringing a steady flow of innovations to the marketplace."). However, the current state of willfulness law discourages this kind of development. Designing around existing patents and developing better solutions requires collaborating companies to know the existing solutions. As long as the case law discourages companies from acquiring knowledge of existing solutions, it will also discourage companies from developing better solutions.

IV. This Court Should Make the Standard for Awarding Treble Damages More Stringent, Not Less

Willfulness is the only reasonable basis for imposing treble damages on an infringer. But current willfulness doctrine is subject to abuse and imposes unnecessary costs on innovative companies who are not accused of copying a patent or even being aware of it when they designed and released their products. This Court should not make that problem worse by loosening the reins on willfulness or giving district courts the power to dispense with it altogether. Certainly, this Court should not undo the progress that *In re Seagate* represents in solving the problem of abuse of treble damages. Rather, this Court should rein in willfulness law and the availability of enhanced damages as a whole, making it more difficult for patentees to plead and prove in circumstances where the defendant acted in good faith.

This Court should draw from the meaning of willfulness in other contexts, including other patent law doctrines such as indirect patent infringement, and limit

punitive damages to circumstances in which the defendant acted intentionally—aware of or willfully blind to the likelihood of infringement—at the time it adopted its technology. *Cf. Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068, 179 L. Ed. 2d 1167 (2011) (holding "induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement[]" which can include "willful blindness"). A company that adopts a technology knowing that it is copied from another is a bad actor that can be deterred. A company that independently develops technology with no knowledge of the patent is not doing anything wrong. The threat of treble damages will deter the latter company, not from copying, but from innovating at all.

Limiting willful infringement to cases in which a defendant copies the technology or otherwise adopts it with knowledge of the patent is consistent with the definition of willfulness elsewhere in patent law. It will encourage innovation and discourage copying. It will alleviate unnecessary and uneven litigation costs and it will set patent law back on the path towards incentivizing research and discovery rather than discouraging it.

CONCLUSION

This Court should hold that treble damages are appropriate only in cases in which the defendant adopts a technology with knowledge that it is likely infringing a patent.

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